NO. 82-5630

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

QUESTIONS PRESENTED

Did the Court of Appeals err in holding Art. 30.02(d)(3), Tex. Penal Code Ann., constitutional by finding that the words "injures" or attempts to injure" were not so vague and ambiguous as to violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

CITATION TO OPINION BELOW

The majority of the opinions of the Court of Appeals is not officially reported but is annexed as Appendix A. The order of the Texas Court of Criminal Appeals is not reported. The order overruling the Petition for Discretionary Review is annexed as Appendix B. Appellant's Notice of Appeal is annexed as Appendix C.

STATEMENT OF JURISDICTION

In affirming Appellant's conviction, the Texas Court of Appeals sustained the constitutionality of Art. 30.02(d)(3), Tex. Penal Code Ann., which provides as follows:

> "A person commits an offense, if, without the effective consent of the owner, he: enters a building not then open to the public with intent to commit a felony or theft. (d) An offense under this section is a felony of the first degree if: (3) any party to the offense injures or attempts to injure anyone effecting entry or while in the building or in immediate flight from the building.

The jurisdiction of this Court is conferred by Title 28, U. S. Code §1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Due Process Clause.

STATUTORY PROVISIONS INVOLVED

Art. 30.02(d)(3), Tex. Penal Code Ann.

A person commits an offense if, without the effective consent of the owner, he: enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft. (d) An offense under this section is a felony of the first degree if: (3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.

STATEMENT OF THE CASE

This is an appeal from the 78th Judicial District Court, Wichita County, Texas, Honorable Stanley C. Kirk presiding. Richard Dwayne Taylor went to trial on the charge of burglary and while in the building, the said Richard Dwayne Taylor did injure the said Ronnie Hale by stabbing him with a sharp instrument, to-wit: one blade of a pair of scissors, alleged to have been committed on the 10th day of December, 1977. Richard Dwayne Taylor was convicted of an offense on October 18, 1978, and was sentenced on December 13, 1978, to life imprisonment in the Texas Department of Corrections and thereupon gave his notice of appeal to the Court of Criminal Appeals of the State of Texas. The case was subsequently transferred to the Court of Appeals, Second Supreme Judicial District. The Court of Appeals, Second Supreme Judicial District, by an opinion rendered on April 28, 1982, affirmed Appellant's conviction. The Petition for Discretionary Review was filed with the Texas Court of Criminal Appeals and was overruled on July 21, 1982.

The Appellant in this cause was charged by a grand jury indictment, which reads in pertinent part as follows:

"That Richard Dwayne Taylor, on or about the 10th day of December, A.D., 1977, and anterior to the presentment of this indictment, in the County of Wichita and State of Texas, did then and there, with intent to commit theft, enter a building which was not then open to the public, without the effective consent of Ronnie Hale, the owner, and while in the building the said Richard Dwayne Taylor did injure the said Ronnie Hale by stabbing him with a sharp instrument, to-wit: one blade of a pair of scissors."

The term "injure" is not defined anywhere in the Penal Code. However, Art. 1.01(a)(7) does define "bodily injury" and Art. 1.07(a)(34) defines "serious bodily injury." These two definitions are quite different. It is not clear whether the injury spoken of in Art. 30.02(d)(3), Tex. Penal Code Ann., is bodily injury or serious bodily injury or some other form of injury or a combination.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

This case presents the important question of whether a person can be charged with an offense of burglary of a building and then have their punishment enhanced to a first degree felony, which exposes a person to life imprisonment, under a provision of the Texas Penal Code which is vague and indefinite, in violation of the Constitution of the United States of America, Fourteenth Amendment, Due Process Clause.

The issue presented to the Texas Court of Appeals was whether or not Art. 30.02(d)(3), Tex. Penal Code Ann. (1979), is void for vagueness. The offense of burglary under the Texas Penal Code is generally punishable as a second degree felony. However, subsection (d) of Art. 30.02 provides three sets of exceptional circumstances which, if proven, elevate the offense to one punishable as a first degree felony. The third of the three exceptions provides that the offense is punishable as a first degree felony if: "any party to the offense injures or attempts to injure anyone in effecting entry or while in the

building or in immediate flight from the building." The term "injure" is not defined anywhere in the Penal Code.

The Court of Appeals addressed this point of error at page three of their opinion. What the Court of Appeals was doing with this opinion is rewriting the statute to change the word "injure" as it appears in the statute to "physical injury." Thus, by a construction, the Court of Appeals is seeking to change the terms of the statute and, in effect, amend it. In addition, it must be recognized that even the term "physical injury" is not defined in the Penal Code, either. Does this mean bodily injury or serious bodily injury. The opinion of the Court of Appeals does not resolve the dilemma. The opinion of the Court of Appeals still leaves the statute unconstitutionally vague even with their interpretation.

It is well settled that appellate courts may not, under the guise of construction, amend the statute by adding provisions thereto, no matter how desirable those additions might seem to the judge. AM Servicing Corp. of Dallas v. State, 380 S.W.2d 74 (Tex.Civ.App.-Dallas 1964). It is for the legislature, not the courts, to remedy defects or supply deficiencies in the law. Sparks v. State, 174 S.W. 351 (Tex.Crim.App. 1915). In United States v. Reese, 92 U.S. 214 (1876), the Supreme Court of the United States held:

> "The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who would be set at large."

It has also been repeatedly held in Texas that the courts cannot supply words, interpolate words, add or eliminate provisions, or enlarge, extend, or restrict the scope of a law. 53 Tex.Jur. 2d, Statutes §124 at p. 179. Baylor v. State,

208 S.W.2d 558 (Tex.Crim.App. 1948); In Re Lebonson, 274 S.W.2d 76 (Tex.Crim.App. 1955); All Texas Racing Association v. State, 82 S.W.2d 151 (Tex.Crim.App. 1935).

It is your Appellant's position that the statute under which he was prosecuted is void for vagueness. As stated by the United States Supreme Court: "The vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts are prohibited." U.S. v. Cardiff, 344 U.S. 174 (1952). Art. 30.02(d)(3), Tex. Penal Code Ann., should be held by this Honorable United States Supreme Court unconstitutional in that it is void for vagueness because the term "injure" as used in the statute under examination is a term of at least double meaning, and perhaps no meaning at all. This Honorable Court, nor the Court of Appeals, nor the trial court can provide a definition for this term inasmuch as our legislature has not itself seen fit to define it. A statute cannot be enforced where its meaning cannot be determined by any known rules of construction, and the Appellant's conviction under Art. 30.02(d)(3), Tex. Penal Code Ann., should be reversed and the above-described statute held void for vagueness and the prosecution dismissed. Wilson v. State, 59 S.W.2d 399 (Tex. Crim.App. 1933).

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the court for their resolution.

Respectfully submitted,

S. Price Smith, Jr.
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

Attorney for Appellant

NO. _____

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

APPENDIX - GENERAL FORM

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

INDEX

NO. 2-81-116-CR

IN THE COURT OF APPEALS FOR THE

SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

RICHARD DWAYNE TAYLOR — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE DISTRICT COURT OF WICHITA COUNTY

OPINION

This is an appeal from a conviction of burglary of a building. Punishment, enhanced by a prior conviction, was assessed by the jury at life imprisonment in the Texas Department of Corrections.

We affirm.

On Saturday morning, December 10, 1977, Ronnie Hale arrived at his automobile upholstering business in Wichita Falls to complete a job. The business was not then open to the public. Hale unlocked the door, entered the building, and proceeded to an oil fueled heat stove to light it. As he kneeled at the stove, Hale noticed a movement beside him. Hale turned and saw the appellant, with whom he had been casually acquainted for sometime. At that point, appellant stabbed Hale in the neck with a blade from a pair of upholstery shears. Appellant, undaunted by Hale's pleas for mercy, continued his assault. After a prolonged struggle, in which he received multiple wounds, Hale escaped from the building and staggered to a used car lot across the street. The owner of the car lot asked Hale what had happened, to which Hale replied that appellant had stabbed him. The victim gave the same response to police officers arriving at the car lot minutes later. Investigation of the upholstery shop revealed

that it had been forcibly entered, and the money box of a coke machine in the building had been pried open.

We find no merit to appellant's contention that the evidence is insufficient to support his conviction. From the evidence, the jury could properly find that appellant entered the building, not then open to the public, with intent to commit theft, without the effective consent of the owner, Ronnie Hale.

The evidence supports the jury's additional finding at the punishment stage of the trial that, while appellant was in the building, he injured Ronnie Hale by stabbing him with a blade from a pair of upholstery shears. Appellant's fourth ground of error is overruled.

By appellant's ground of error number one, he claims that the statute, under which he was prosecuted, is unconstitutional. V.T.C.A., Penal, sec. 30.02, states in pertinent part: "(a) A person commits an offense if, without the effective consent of the owner, he: (1) enters a habitation or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; . . . (d) An offense under this section is a felony of the first degree if . . . (3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building."

Appellant contends that subsection (d)(3), which escalates the offense of second degree burglary into a first degree offense if the actor injures anyone during commission of the burglary, is unconstutionally vague. Specifically, appellant argues that the term "injure" is not defined in the Penal Code, although the terms "bodily injury" and "serious bodily injury" are defined. Therefore, appellant argues, if the statute is intended to address only physical harm or incapacitation to a person, it would couch its language in terms of "bodily injury" or "serious bodily injury". Appellant stresses that "to injure anyone" encompasses

a broad range of transgressions beyond the scope of personal assault, such as causing property damage or a violation of a legal right. Appellant argues that no statute can survive such indefinite composition.

It is the duty of this court to construe statutes in such a way as to uphold their constitutionality. Ely v. State, 582 S.W.2d 416 (Tex. Crim. App. 1979). When construing a statute, the court must determine and follow the legislative intent underlying the enactment of the statute. Faulk v. State, 608 S.W.2d 625 (Tex. Crim. App. 1980).

Examination of the statute in question leads us to the conclusion that the legislation sought to deter physical assault by an actor against another in the course of a burglary. To construe the phrase "injure another" to include violation of a legal right or property damage would be superfluous. Damage to property and violation of a legal right exist upon the occurrence of the burglary. Thus, under this construction, the aggravating circumstances of the first degree felony would be no greater than the ordinary result of the second degree offense of burglary itself.

A reading of the remainder of subsection (d) indicates that the offense is of the first degree if (1) the building is a habitation; or (2) if the actor is armed with a deadly weapon or explosives. The clear import of this subsection is to deter physical injury to people. We decline appellant's invitation to hold the statute unconstitutionally vague. Ground of error one is overruled.

Appellant's second ground of error asserts that the indictment under which he was prosecuted is fundamentally defective. The indictment reads in pertinent part:

> "That Richard Dwayne Taylor on or about the 10th day of December, A.D., 1977 and anterior to the presentment of this indictment, in the County of Wichita and

the State of Texas, did then and there, with intent to commit theft, enter a building which was not then open to the public, without the effective consent of Ronnie Hale, the owner, and while in the building the said Richard Dwayne Taylor did injure the said Ronnie Hale by stabbing him with a sharp instrument, to-wit: one blade of a pair of scissors..."

Appellant claims that the State was required to plead and prove a culpable mental state, not only in commission of the burglary, but also in commission of the injury to Ronnie Hale. This same contention has been rejected by the Court of Criminal Appeals in relation to other sections of the Penal Code. In Bilbrey v. State, 594 S.W.2d 754 (Tex. Crim. App. 1980), it was held that a culpable mental state is not required to be alleged or proven for the exhibition of a deadly weapon during the commission of a robbery in order to elevate the offense to aggravated robbery. Culpability is required in the allegation of the primary offense, but is not necessary with reference to the aggravating circumstance.

Another case, in which this contention was advanced and rejected, dealt with the statute proscribing the carrying of weapons on or about the person. Uribe v. State, 573 S.W.2d 819 (Tex. Crim. App. 1978). In that case the Court of Criminal Appeals addressed V.T.C.A., Penal, §46.02, which provides:

"(a) A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.

"(b) Except as provided in Subsection (c), an offense under this section is a Class A misdemeanor.

"(c) An offense under this section is a felony of the third degree if it occurs on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages."

Appellant, in Uribe v. State, supra, was indicted for illegally carrying a firearm on a premises licensed to sell alcoholic beverages. The indictment alleged a culpable mental state for carrying the weapon, i.e., that he "did then and there knowingly and intentionally carry on and about his person a handgun. . ."

However, no culpability was alleged with regard to the aggravating factor of subsection (c), to-wit: carrying the firearm on a premises licensed to sell alcoholic beverages. The court, in rejecting the defective indictment claim, stated: "The definition of this offense in sec. 46.02(a), supra, prescribes a culpable mental state. Section 46.02(c), supra, does not create a separate offense, however, as its only effect is to raise the penalty when the offense is committed in a designated place. Thus the offense created by Subsections (a) and (c), supra, does not require a culpable mental state beyond that contained in Subsection (a)." Id. at 821.

We find, on the basis of the above authority, that the culpability alleged in the indictment is sufficient for the offense of burglary. No additional culpability need be alleged for the same offense to be elevated from a second to a first degree felony, due to the occurrence of an aggravating factor contained in the statute. Appellant's second ground of error is overruled.

In a related ground of error, appellant maintains that the trial court erred fundamentally in its charge to the jury at the guilt or innocence stage of the trial. The pertinent part of the charge states:

> "Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Richard Dwayne Taylor, did, in Wichita County, Texas, on or about December 10, 1977, without the effective consent of Ronnie Hale, the owner, enter a building, which was not then open to the public, with intent to commit theft, you will find the defendant guilty of burglary.
>
> "If you do not so believe, or if you have a reasonable doubt thereof, you will find the defendant not guilty."

Appellant contends that since the charge omits the injury allegation contained in the indictment, there is a fatal variance between the two. We reject this proposition.

As discussed with reference to ground of error two, the offense for which appellant was indicted, tried, and convicted is burglary. The charge, by the court, at the guilt or innocence stage of the trial correctly reflects this. The aggravating circumstance, in this case injury to Ronnie Hale, pertains to penalty not guilt.

Appellant recognized this by his motion in limine, which was granted by the trial court, wherein he requested that the aggravating circumstances, i.e., the injury to Ronnie Hale, not be submitted to the jury at the guilt or innocence phase of the trial. The trial court correctly charged the jury at the punishment phase of the trial on the range of punishment for burglary of a building (a second degree felony) as well as for burglary of a building with the aggravating factor of injury to a person (a first degree felony). Iness v. State, 606 S.W.2d 306 (Tex. Crim. App. 1980). Ground of error three is overruled.

The judgment of the trial court is affirmed.

RICHARD LEE BROWN,
JUSTICE

PANEL B
HUGHES, BROWN AND HOLMAN, JJ.
PUBLISH

APR 28 1982

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas JUL 21 1982

I have been instructed to advise that the Court has this day refused the Appellant's petition for discretionary review in Cause No. 0434-82, Richard Dwayne Taylor

Sincerely yours,

THOMAS LOWE, Clerk

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

RICHARD DWAYNE TAYLOR
Appellant

VS. § NO. 0434-82

THE STATE OF TEXAS,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Dwayne Taylor, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals of Texas, entered herein on the 21st day of July, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

SMITH, DOUGLASS & COOK
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

By: S. Price Smith, Jr.
State Bar No. 18753500

Attorney for Appellant

NO. 82-5630

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

AFFIDAVIT

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

NO. _____

THE STATE OF TEXAS §
AFFIDAVIT
COUNTY OF WICHITA §

BEFORE ME, the undersigned authority, on this day personally appeared S. Price Smith, Jr., who after first being duly sworn, stated under oath as follows:

"My name is S. Price Smith, Jr. I have personal knowledge that within the time specified for filing, and specifically the 15th day of October, 1982, the following instruments were deposited in the United States mail, with first-class postage prepaid, certified, return receipt requested, properly addressed to the Office of the Clerk, The Supreme Court of the United States, Washington, D. C. 20543:

1. Notice of Formal Appearance or Entry of Appearance by Counsel for Appellant;
2. Motion for Leave to Proceed in Forma Pauperis;
3. Jurisdictional Statement - State Criminal Case;
4. Designation by Appellant of Parts of Record to be Included in Appendix.

S. Price Smith, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME this 25th day of October, 1982.

Bridget Barnhill
Notary Public in and for Wichita County, Texas

BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 6, 1985
SS 457-82-1489

CERTIFICATE OF SERVICE

ON THIS the 25th day of October, 1982, a true and correct copy of the foregoing affidavit was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas 76301, who is the only opposition party in this cause and who represents the State of Texas, by depositing a copy of the affidavit in the United States Mail, certified, return receipt requested.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 25th day of October, 1982.

Notary Public in and for Wichita County, Texas

BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 8, 1985
S.S. 457-62-1429

NO. 82-5630

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

DESIGNATION BY APPELLANT OF PARTS OF RECORD TO BE INCLUDED IN APPENDIX

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

NO. _____

DESIGNATION BY APPELLANT OF PARTS OF RECORD
TO BE INCLUDED IN APPENDIX

TO: Timothy Eyssen, Counsel for Respondent

Appellant, Richard Dwayne Taylor, hereby designates the following portions of the record to be included in the appendix:

1. Indictment in the case styled The State of Texas v. Richard Dwayne Taylor, in Cause Number 18,059-C, in the 89th Judicial District Court of Wichita County, Texas.

2. Motion to Declare Article 30.02(d)(3), Vernon's Texas Penal Code Annotated, Unconstitutional, in the case styled The State of Texas v. Richard Dwayne Taylor, in Cause Number 18,059-C, in the 89th Judicial District Court of Wichita County, Texas.

3. Opinion of the Court of Appeals, No. 66,850, dated April 28, 1982.

4. Order Overruling Appellant's Petition for Discretionary Review dated July 21, 1982.

5. Notice of Appeal to the Supreme Court of the United States filed August 30, 1982.

S. Price Smith, Jr.
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

Attorney for Appellant

CERTIFICATE OF SERVICE

On this 15th day of October, 1982, a true and correct copy of the foregoing document was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas, 76301, who is the only opposition party in this Jurisdictional Statement and who represents the State of Texas, by depositing a copy of the above document in the United States Mail, certified, return receipt requested.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 15th day of October, 1982.

Notary Public in and for Wichita County, Texas

BRIDGET BARNHILL
Notary Public, State of Texas
My Commission Expires May 6, 1985

NO. 82-5630

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

NOTICE OF FORMAL APPEARANCE
OR ENTRY OF APPEARANCE BY COUNSEL FOR APPELLANT

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

NO. _____

NOTICE OF FORMAL APPEARANCE
OR ENTRY OF APPEARANCE BY COUNSEL FOR APPELLANT

TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES S. Price Smith, Jr., attorney for the Appellant herein, who has represented this Appellant on his appeal to the Texas Court of Criminal Appeals at Austin, Texas, and hereby gives notice of formal appearance in this Appellant's Jurisdictional Statement in that he has prepared the papers filed herein. His mailing address is:

S. Price Smith, Jr.
Attorney at Law
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

S. Price Smith, Jr.
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

Attorney for Appellant

CERTIFICATE OF SERVICE

On this 15th day of October, 1982, a true and correct copy of the foregoing document was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas, 76301, who is the only opposition party in this Jurisdictional Statement and who represents the State of Texas, by depositing a copy of the above document in the United States Mail, certified, return receipt requested.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 15th day of October, 1982.

Notary Public in and for Wichita County, Texas

BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 6, 19[illegible]
S.S. 457-82-1488

NO. 82-5630

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 1873500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

NO. _____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant, Richard Dwayne Taylor, moves the Court for an order permitting him to proceed in this Court, in forma pauperis, with his appeal from the judgment of the Texas Court of Criminal Appeals entered in this cause on July 21, 1982, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said appellant.

Appellant's jurisdictional statement is being filed with this motion and appellant's affidavit.

S. Price Smith, Jr.
State Bar No. 18753500
Suite 210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

CERTIFICATE OF SERVICE

On this the 15th day of October, 1982, a true and correct copy of the foregoing document was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, 7th and Lamar Street, Wichita Falls, Texas 76301, who is the only opposition party in this cause and who represents the State of Texas, by depositing a copy of the above document in the United States mail, certified, return receipt requested, at Wichita Falls, Texas 76301.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 15th day of October, 1982.

Bridget Barnhill
Notary Public, Wichita County, Texas

BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 6, 19[illegible]
S.S. 457-92-1459

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Richard Dwayne Taylor, hereby apply for leave to proceed in the above-entitled action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the Appellant in the above-entitled case and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

(3) The nature of my appeal is briefly stated as follows: constitutionality of Art. 30.02(d)(3), Tex. Penal Code Ann.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   None; I have been incarcerated for the last four years.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Richard D. Taylor
RICHARD DWAYNE TAYLOR

SUBSCRIBED AND SWORN TO before me this 12 day of October, 1982.

D L Wall
Notary Public in and for Walker County, Texas

My commission expires:
5/31/86

NO. 82-5630

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER*
BARBARA J. LIPSCOMB
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

*Attorney of Record

QUESTION PRESENTED

I. WHETHER SECTION 30.02(d)(3), TEX. PENAL CODE (VERNON 1974) IS UNCONSTITUTIONALLY VAGUE FOR THE REASON THAT THE TERMS "INJURES" AND "ATTEMPTS TO INJURE" ARE NOT DEFINED IN THE STATUTE.

NO. 82-5630

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW The State of Texas, Appellee herein, by and through her attorney, the Attorney General of Texas, and moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Second Supreme Judicial District is reproduced as Appendix A to Appellant's jurisdictional statement. The order of the Texas Court of Criminal Appeals overruling the petition for discretionary review is reproduced as Appendix B to the jurisdictional statement. Appellant was convicted in the district court of Wichita County, Texas, of violation of §30.02(d)(3) of the Texas Penal Code and sentenced to life imprisonment in the Texas Department of

Corrections. By opinion rendered April 28, 1982, the Court of Appeals for the Second Supreme Judicial District of Texas affirmed Appellant's conviction, sustaining the constitutionality of Section 30.02(d)(3) against Appellant's due process challenge. A timely filed petition for discretionary review with the Texas Court of Criminal Appeals was overruled on July 21, 1982.

This Court has appellate jurisdiction under 28 U.S.C. §1257(2) to entertain this appeal. Appellant raised the issue of the statute's constitutionality in the Court of Appeals and the decision was in favor of its validity.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. XIV:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law.

Section 30.02(d)(3), Tex. Penal Code (Vernon 1974):

> (a) A person commits an offense if, without the effective consent of the owner, he:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or
>
> (2) remains concealed, with intent to commit a felony or theft, in a building or a habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony of theft.
>
> * * *
>
> (d) An offense under this section is a felony in the first degree if:
>
> (1) the premises are a habitation; or
>
> (2) any party to the offense is armed with explosives or a deadly weapon; or
>
> (3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.

STATEMENT OF THE CASE

The Statement of Facts contained in Appellant's jurisdictional statement is substantially correct.

MOTION TO DISMISS

APPELLANT'S CONSTITUTIONAL CHALLENGE TO §30.02(d)(3), TEX. PENAL CODE (VERNON 1974), IS INSUBSTANTIAL.

Appellant committed the offense of burglary by entering a building which was not then open to the public with the intent to commit theft. According to the Texas burglary statute, the offense of burglary is normally a felony of the second degree; however, in this case, the jury found that Appellant had stabbed the shopkeeper repeatedly with one blade of a pair of scissors or shears. Therefore, under Subsection (d) of the statute, the offense was elevated to a felony of the first degree, and Appellant's punishment was assessed at life imprisonment. Appellant now argues that Subsection (d) violates the due process clause of the Fourteenth Amendment in that the term "injury" in that section is not defined specifically as physical injury, but could conceivably encompass damage to property or violation of a legal right. Hence, Appellant argues that the entire statute is unconstitutionally vague.

As discussed in Appellee's motion to affirm, infra, considering the statute as a whole, it is clear that the terms "injury" refers to physical or bodily injury. In any event, the issue as it is presented here is not sufficiently important to merit briefing or argument. A penal statute violates the due process clause only when it is so vague that it fails to fairly apprise a reasonable person of the conduct which is prohibited. E.g., Smith v. Goguen. 415 U.S. 566 (1975). This is not the case where the State has prosecuted a defendant for an action which is arguably not contemplated by the statute. Whatever else "injure" could mean, it clearly encompasses the sort of serious physical

assault which the jury found had occurred during this burglary.[1/] Appellant's purely speculative argument regarding the possible meaning of the statute under some strange interpretation does not raise a serious due process question worthy of this Court's plenary consideration. The issue should therefore be treated as insubstantial, and the appeal dismissed.

MOTION TO AFFIRM

THE TERM "INJURY" AS USED IN §30.02(d), TEX. PENAL CODE (VERNON 1974), IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant takes the position that since the term "injury" is not specifically defined in Texas burglary statute, neither the state courts nor the federal courts have the power to supply a meaning. It has always been an important function of the courts, however, to apply statutory law according to well-recognized rules of construction. In Texas, these rules are codified as Article 5429b-2, Tex. Stat. Ann. (Vernon Supp. 1982), the Code Construction Act, and that act is specifically applicable to the Texas Penal Code. Applying these rules of construction to the issue at hand, then, it is clear that §30.02(d)(3) refers to physical injury.

First, in construing the statute, it must be presumed that the entire statute is to be effective. Parr v. State, 575 S.W.2d 522 (Tex.Crim.App. 1979); Article 5429b-2 §3.01(2). As the Texas Court of Appeals pointed out, "to construe the phrase 'injure another' to include violation of a legal right or property damage would be superfluous. Damage to property and violation of a legal right exists upon the occurrence of the burglary." (Appendix A at 10). According to Appellant's view of the statute, the entire Subsection (d)(3) would add nothing whatsoever to the operation of the statute. If that subsection refers to physical injury, however, the section is meaningful.

1/ It is interesting to note that Appellee has located no cases where a defendant was prosecuted under this subsection for anything other than serious physical injury.

Moreover, such a reading is consistent with the apparent legislative intent. The Texas Code Construction Act specifically invites a court to consider among other matters the legislative history of an act and common law or former statutory provisions, including laws upon the same or similar subjects. The current Texas burglary statue, §30.02, was enacted in 1974 as part of the new Texas Penal Code. Section 30.02 encompassed several sections of the old code, including Article 1164, which set out a separate offense called "assault in attempting burglary". That article provided that:

> If any person in attempting to commit burglary shall assault another, he shall be confined in the penitentiary for two to five years.

Acts, 1973, 63rd Leg. p. 883, ch. 399 §1. In the new penal code, rather than constituting a separate offense, an assault during burglary or attempted burglary simply escalates the primary offense from a second degree to a first degree felony. This suggests that Subsection (d)(2) was intended to refer specifically to physical injury.

An examination of similar statutes in the new penal code supports Appellee's reading of the statue. For instance, the penalties for theft, robbery, and arson are similarly enhanced if the primary offense results in bodily injury. See, Tex. Penal Code §§28.02, 29.03, and 31.03.

Finally, a reading of §30.02 itself tends to the conclusion that Subsection (d) is intended to deter injuries to persons in the course of what otherwise would be a property crime. As the Court of Appeals noted, the remainder of Subsection (d) escalates the offense to a first degree felony if (1) the building is a habitation; or (2) if the actor is armed with a deadly weapon or explosives. The Code Construction Act admonishes construing courts to presume that statute is intended to reach a fair and reasonable result. In this instance, it is entirely reasonable that a harsher penalty be imposed where a burgler inflicts bodily harm or commits burglary under circumstances which increase the

probability that an innocent person will be injured. Thus, all the factors which the Court is required to consider in construing a statute such as this one compel the conclusion that the term "injury" in Subsection (d) means physical injury or bodily harm, and that meaning is clear even without a specific definition in the statute.

CONCLUSION

Wherefore, premises considered, Appellee respectfully prays that this Court dismiss the appeal for want of a substantial federal question or, in the alternative, affirm the decision of the Texas Court of Appeals.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

Barbara J. Lipscomb

BARBARA J. LIPSCOMB
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR APPELLEE

NO. 82-5630

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the _____ day of November, 1982, one copy of the Respondent's Brief in Opposision was mailed, postage prepaid, to Mr. S. Price Smith, Jr., 210 Executive Building, Wichita Falls, Texas 76301. All parties required to be served have been served. I am a member of the Bar of this Court.

Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 17th day of November, 1982.

Barbara D. Pate

NOTARY PUBLIC in and for
Travis County, T E X A S